No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR CERTIORARI

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June 25, 1983

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Broadcasters ("NAB") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The consent of attorneys for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of NAB in this case is set out in detail at pages 1 and 2 of the attached brief. Stated briefly, NAB is an association of radio and television broadcasters whose membership includes stations broadcasting within the State of Oklahoma and also out-of-state broadcasters whose programming is carried by the petitioner cable companies within the

State of Oklahoma. Both are directly affected by the state's ban on advertising of wine and alcoholic beverages upheld by the Tenth Circuit Court of Appeals below. NAB has an interest in preserving the right of these member stations to disseminate, and in the right of their Oklahoma listeners and viewers to receive, the advertising and programming effectively barred by the decision below. NAB also has an interest in the broader First Amendment issues raised by the decision of the court below in upholding Oklahoma's prohibition of an entire class of advertising. Member stations throughout the United States may face similar prohibitions of other classes of advertising and, thereby, interference with the free flow of both advertising and programming if the decision below is permitted to stand.

As the Petition for a Writ of Certiorari sets out in its Statement of the Case, the State of Oklahoma has imposed a ban on the advertising of wine and other alcoholic beverages in the State of Oklahoma. All media originating within the state are required to delete such advertising. As applied to petitioners' cable television systems, the prohibition would also require deletion of such advertising from, *inter alia*, broadcast signals originating outside the state's boundaries.

The Oklahoma Attorney General, representing the respondent Director of the Oklahoma Alcoholic Beverage Control Board *has* consented to the filing of *amicus curiae* briefs on behalf of the print media (American Newspaper Publishers Association and Magazine Publishers Association) and the cable media (National Cable Television Association), each of which is in a position to inform the Court as to the impact of the advertising ban on their respective members' operations. None of these associations, however, represents the interests of the broadcasters whose programming will be deleted from the petitioners' cable systems. Such state-mandated deletion raises serious First Amendment issues concerning noncommercial speech in addition to the commercial speech questions already presented. NAB respectfully submits that the attached brief will provide the Court with a more complete development of

these noncommercial speech issues and will demonstrate additional reasons why the Petition should be granted.

NAB therefore respectfully moves the Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters supports the petition for a writ of certiorari in the above-captioned case.[1]

[1] A copy of the written consent of the petitioners is filed with this brief, as required by Rule 36 of the Court.

The National Association of Broadcasters ("NAB") is a nonprofit association of radio and television stations and broadcasting networks. As of June 15, 1983, NAB membership included 4,437 radio stations, 700 television stations and all the major broadcast networks. Among its members are stations broadcasting within the State of Oklahoma and also out-of-state broadcasters whose programming is carried by the petitioner cable companies. Both are directly affected by the Oklahoma advertising ban and the decision of the Court of Appeals below. NAB has a direct interest in the right of these member stations to disseminate, and in the right of their Oklahoma listeners and viewers to receive, the advertising and programming effectively barred by the decision below.

On a broader scale, NAB has an interest in the serious First Amendment issues raised by Oklahoma's prohibition of an entire class of advertising. If the decision below is permitted to stand, it will encourage other states to seek advancement of local goals through similar prohibitions of speech, ultimately interfering with the free flow of both commercial and noncommercial information.

SUMMARY OF ARGUMENT

The decision of the court of appeals threatens recognized First Amendment interests in several respects. First, the ban on advertising directly prohibits truthful commercial speech concerning lawful products. Second, its application to the petitioner cable companies denies listeners and viewers the right to receive not only the prohibited advertising, but also the broadcast programming integrally tied to that advertising. And, in addition, by upholding the prohibition of an entire class of advertising, the court's decision establishes precedent that may be applied to prohibit other types of advertising, which ultimately could weaken the commercial support of the news and information services of free broadcasting. Under the decisions of this Court, none of these results can be justified by the state interest asserted or by the fact that it arises under the Twenty-first Amendment.

These incursions on First Amendment interests, individually, justify granting the requested writ. But the effective preclusion of *noncommercial* speech sanctioned by the decision below surely should compel this Court to accept review. So long as that decision stands, members of the public can be denied access to news, commentary, entertainment, and commercial information about other goods and services, for no reason other than the fact that one of the program sponsors happens to advertise wine.

ARGUMENT

I. THE DIRECT EFFECT OF OKLAHOMA'S ADVERTISING BAN IS TO RESTRAIN DISTRIBUTION OF NONCOMMERCIAL SPEECH, IN VIOLATION OF THE FIRST AMENDMENT.

A. The Effect, and Not the Intent, of State Regulation on Protected Speech Is Controlling.

The declared intent of the State of Oklahoma is to prohibit only commercial speech, and, ostensibly, only commercial speech within Oklahoma. The ability of the state to impose such a broad prohibition in the face of the First Amendment is, of course, a central issue presented by this case, and one in which NAB's Oklahoma member stations have a direct interest.

However, the effect of the state's action on broadcast programming originating outside the state raises equally compelling First Amendment issues. By imposing the advertising ban on cable television systems, the state prohibits dissemination of not only commercial speech, but also, as a practical matter, the noncommercial speech—news, information, and entertainment—which is broadcast with wine advertising from stations outside the state. While Oklahoma may not intend to suppress distribution of news and ideas, that is the demonstrable result. (*See* Opinion of District Court on Summary Judgment, App. G to Petition at 41a.)

Governmental action which substantially burdens the exercise of First Amendment rights cannot be justified by the mere fact that the intent may be proper or the result unin-

tended. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, whatever right the State of Oklahoma may have to restrict advertising of alcoholic beverages, it is clear that it may not exercise that right in a manner that substantially restricts other protected speech.

The district court below found, as an uncontroverted fact, that "[t]here exists no feasible way for Plaintiffs to block out the [wine] advertisements" carried as a part of broadcast signals distributed by the petitioner cable companies. App. G to Petition at 41a. The only way for the cable companies to comply with the state law, therefore, would be to eliminate wine-sponsored programming in its entirety from those signals,[2] or even to discontinue carriage of those broadcast signals altogether. Either of these steps would constitute a state-compelled restraint on noncommercial speech impermissible under the First Amendment.

B. Distribution of Information Is Protected by the First Amendment.

The state may argue that enforcement of its ban does not interfere with the programming of out-of-state broadcasters, in that it affects only the distribution of that programming in Oklahoma. Such an argument, however, ignores the fact long recognized by this Court that the right to freely *distribute* information and the concomitant right to receive it are inseparable components of free speech protected by the First Amendment. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Lovell v. Griffin*, 303 U.S. 444 (1938). *See also Associated Press v. United States*, 326 U.S. 1, 20 (1945).

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[2] Even assuming such program deletion is possible, it would pose additional problems under 47 C.F.R. § 76.55(b), which requires that broadcast signals be carried in full, "without deletion or alteration of any portion," and under the Copyright Act, 17 U.S.C. § 111(c)(3). *See* Petition at 5.

The First Amendment interest in wide dissemination of broadcast programming within Oklahoma is in no way diminished by the fact that the broadcasters in question may be licensed to communities outside the state. The Communications Act-based scheme of distributing radio and television licenses can hardly be viewed as a restriction on the dissemination of ideas.

The State of Oklahoma presently takes the view that it cannot prohibit its citizens from receiving out-of-state magazines and newspapers. *See* Petition at 4-5. Presumably, it would not seek to prohibit reception of out-of-state broadcast programming. Yet the enforcement of the state's ban on wine advertisements carried with such programming will have that effect, in violation of the First Amendment.

II. OKLAHOMA'S TOTAL PROHIBITION OF ALCOHOLIC BEVERAGE ADVERTISING BANS PROTECTED COMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. Oklahoma's Advertising Ban Is Inconsistent With First Amendment Protection Recognized in Decisions of this Court.

The Tenth Circuit decision upholding Oklahoma's ban of alcoholic beverage advertising is in direct conflict with decisions of this Court affording First Amendment protection to commercial speech. This Court repeatedly has held that truthful advertising of lawful products is protected by the First Amendment. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Since the Court first extended First Amendment protection to commercial speech, it has not upheld a blanket ban on the dissemination of truthful, nondeceptive commercial speech concerning lawful activity. *See Central Hudson*, 447 U.S. at 566 n.9; *Bates v.*

State Bar of Arizona, 433 U.S. 350 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977). *See also* Barrett, *The Uncharted Area—Commercial Speech and the First Amendment*, 13 U.C.D. L. Rev. 2 (1980). As the Court stated in *Metromedia*, 453 U.S. at 505:

> A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

Even a more limited restriction on protected commercial speech than is involved in this case must fall unless it "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The Court made it clear that such a limited restriction "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . ." *Id.* at 564. Here, there was no evidence before the court below linking the advertising of alcoholic beverages to alcohol abuse, nor was there evidence that banning in-state advertising of wine and liquor would "directly advance" the state's interest in reducing alcohol abuse.[3] There was, simply, a leap of logic employed by the court of appeals that cannot be sustained under *Central Hudson*.

The Tenth Circuit similarly ignored the possibility, recognized by the district court (App. A to Petition at 49a), that less restrictive means of advancing the state interest may have been available. Rather, the court of appeals endorsed the state's adoption of the most restrictive means—that is, a prohibition of commercial expression. That sweeping ban of protected speech

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[3] There is, in fact, evidence to support the conclusion that the major function and effect of alcoholic beverage advertising is to promote brand loyalty and increase the market share of the particular advertiser, rather than to increase overall consumption and sales. *See Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, 331, *reh'g en banc ordered* (5th Cir. Mar. 11, 1983). There is also evidence, noted by the district court (App. G to Petition at 48(a)) and by the Fifth Circuit in *Lamar*, 701 F.2d at 332, that an intrastate ban on advertising is ineffective in view of the volume of interstate liquor advertising available to the state's residents.

cannot be squared with the First Amendment or with decisions of this Court.

B. The Protection Afforded Commercial Speech by this Court Is Not Diminished in a Twenty-first Amendment Context.

The states' authority to regulate the sale and consumption of alcoholic beverages under the Twenty-first Amendment cannot be construed to reduce the protection afforded commercial speech by this Court. While that authority has been extended beyond the literal meaning of "transportation or importation" of alcoholic beverages,[4] the Court, in recent years, has narrowed the scope of permissible state regulation under the Twenty-first Amendment. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). In *Craig v. Boren*, 429 U.S. 190, 206 (1976), the Court stated:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional issues becomes increasingly doubtful. As one commentator has remarked, "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

And, as the Tenth Circuit court conceded, "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." App. A to Petition at 17a.

This Court has required that Twenty-first Amendment incursions upon other constitutional interests be considered "in the context of the issues and interests at stake in any concrete case," *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964). In the area of commercial speech, the Court provided

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[4] *See, e.g., Joseph D. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Joseph Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); and *State Board of Health v. Young's Market*, 299 U.S. 59 (1939).

in *Central Hudson* the mechanism for assessing these "issues and interests." The power of states to wield Twenty-first Amendment authority simply has not been expanded to include the power to prohibit protected commercial speech by the media. Whatever the power of the state may be to advance its interest in reducing sales, consumption, and abuse of alcoholic beverages—under the Twenty-first Amendment or otherwise—the manner in which that power is exercised must still pass constitutional muster. *Central Hudson* makes it clear that state authority must be exercised in a fashion that does not compromise the First Amendment protection extended to commercial speech under the decisions of this Court.

III. THE COURT'S REASONING BELOW CREATES PRECEDENT FOR RESTRICTING OTHER CLASSES OF ADVERTISING.

The state's restriction on alcoholic beverage advertising presents important issues concerning both commercial and noncommercial speech that warrant review by this Court. Moreover, the impact of that restriction may not be limited to liquor advertising.[5]

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[5] The court of appeals' initial discussion of *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) might suggest such limited interpretation. *See* App. A to Petition at 7a-9a, 13a-17a. However, that court also notes at one point that "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment," (App. A to Petition at 17a), and proceeds to work through the *Central Hudson* test with only indirect reliance on the Twenty-first Amendment. The result is a rationalization of advertising prohibitions that could be applied in any case where a court believed "additional deference" was due the decisions of a legislative or regulatory body.

Even if the Tenth Circuit opinion is viewed strictly as a "Twenty-first Amendment case," the decision goes far beyond the bounds of acceptable regulation recognized by other courts in applying that amendment. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), *cert. denied*, 102 S. Ct. 2296 (1982) (ban on nude dancing in liquor licensed establishments); *Craig v. Boren*, 429 U.S. 190 (1976) (prohibition of *sale* of liquor on gender-based age classification); *California v. LaRue*, 409 U.S. 109 (1972) (ban of sexual activity in liquor licensed establishments); *Queensgate Investment Co. v. Liquor Control Commission, supra* (restrictions on price advertising by liquor license holders). In none of these cases is there any support for a total ban on advertising or a prohibition directed at the media which carries such advertising.

The court of appeals opinion does speak of "the additional deference owed to the legislature as a result of the Twenty-first Amendment" and weighs that deference heavily in the balance against First Amendment interests (*see* App. A to Petition at 22a-24a). But the danger in the decision below is the ease with which a total ban on other classes of advertising could be justified by the assertion of *any* substantial state interest. Under the court of appeals' misapplication of *Central Hudson* and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), all that is required is a "reasonable relationship" between a prohibition against advertising and the presumed reduction of the sale of products that contribute to the perceived problems. The language of the court below itself suggests the extreme reach of such reasoning:

> The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally.[6]

App. A to Petition at 22a. From this it would follow that there always will be a "reasonable relationship" between advertising sought to be banned and any social interests related to use of the products or services advertised. Such a construct does not depend on the presence of a Twenty-first Amendment interest and, if followed by other states and other courts, it could encourage the prohibition of advertising of any number of products and services.

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[6] In a strikingly similar case, the Court of Appeals for the Fifth Circuit in *Lamar Outdoor Advertising*, 701 F.2d at 331, was *not* willing to accept the validity of such a "reasonable belief" as a basis for prohibiting alcoholic beverage advertising. There, the court found *conflicting* evidence on the question of whether advertising promoted overall consumption of alcoholic beverages or only affected brand loyalty and market share of the advertiser. The court agreed with the district court finding in the present case (*see* App. G to Petition at 48a) that "the ban on advertising is at best an indirect means of advancing the State's interest" and not sufficient to justify infringement of the First Amendment rights involved. *Id.* at 331-33.

The prospect of wide-ranging advertising prohibitions is of obvious concern to NAB's members. It is an economic fact of life that advertising revenues have a direct effect on the ability of broadcasters to maintain news organizations and to offer quality programming, just as the "news hole" of a newspaper depends on the amount of advertising sold. This close interdependence of commercial and noncommercial speech in the mass media provides yet another reason for examining with increased care the type of blanket prohibition of advertising upheld by the Tenth Circuit in this case. As the Court noted in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), such a ban imposed on the media "incur[s] more serious First Amendment overtones" than would restrictions applied only to the advertiser. *See also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 382-83 (1973).

The decision of the Tenth Circuit, if allowed to stand, may be seen by some—other states, regulatory bodies, special interest groups—as precedent for prohibiting advertising of other products and services in response to any number of perceived social problems. Given the cumulative effect of even a few such prohibitions on the media, the danger of such a precedent cannot be ignored. The Court is urged to review the decision below before it has this effect.

CONCLUSION

The decision of the court of appeals, if allowed to stand, creates a dangerous precedent for curtailing commercial speech without adequate analysis of either the alternatives to, or the effects of, such a prohibition. And, of equal importance, it ignores the impact of such a prohibition on the dissemination of broadcast programming integrally connected to the advertising in question. In both instances, the implications of the decision reach beyond alcoholic beverage advertising and threaten the free flow of information in both commercial and noncommercial contexts. Review by this Court is required to protect these vital First Amendment interests.

Respectfully submitted,

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